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No. 193.

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IN THE

Supreme Court of the United States

October Term, 1941.

PHILIP H. SIMON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF.

ARTHUR GARFIELD HAYS,
Solicitor for Petitioner.

STEPHEN P. PIGA,
SIDNEY STRUBLE,
ELIAS MESSING,
Of Counsel.

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POINT I.

The assumption of the Prosecuting Attorney in cross-examining defendant's character witness that defendant had a police or criminal record violated the "rule against particular facts" to the substantial prejudice of the defendant.

The Prosecuting Attorney in his cross-examination of Dr. Gerber on the theory that he was a character witness for the defendant, assumed in his questions that the defendant had a "previous police or criminal record in his community"; "that he (defendant) was charged in 1933 with the crime of conspiracy and that he was charged in 1934 with having performed an abortion" (R. 12).

The respondent dismisses the matter by stating that this method of suggestion of prior crimes and police records "escapes violation of the 'rule against particular facts', which is the danger to be guarded against when testing the grounds of the witness' knowledge of the accused's reputation" (Resp. Brief, p. 5).

Obviously this is not so, since such questions assume the fact of previous police or criminal records.

Likewise, a question as to prior charges of the crimes of conspiracy and of abortion assumes such particular facts, but respondent is silent on this point in his brief.

What clearer violation of the "rule against particular facts" (see 3 Wigmore, Evidence, 3rd Ed. Section 988) could there be than that contained in these questions?

If, in a criminal trial, at a time when there is no evidence or testimony of such fact in the case, the prosecuting attorney asks defendant's witness whether or not he knew defendant had previously been charged with the crimes of conspiracy and abortion, such question necessarily assumes that such was the fact. A negative answer by the witness would not cure this violation of the "rule against particular facts", which requires direct proof of facts, not their establishment by indirection, innuendo or suggestion.

The Circuit Court of Appeals for the Third Circuit was in error in failing to rectify the substantial prejudice occasioned by these questions and its decision in this respect is in conflict with those of other Circuit Courts of Appeals and with its own later decision in *U. S.* v. *Nettl*, 121 F. (2d) 927 (C. C. A. 3rd, 1941).

POINT II.

The good or bad faith of the Prosecuting Attorney in asking questions is of no importance, if the form of such questions substantially prejudices the defendant's right to a fair and impartial trial.

Respondent, in its brief at page 7, suggests that if the Prosecuting Attorney acted in good faith in asking a question, however prejudicial to the defendant's rights to a fair trial, this would remove the sting and onus from such a question and bar the defendant from objecting thereto, even though the result was to prejudice the defendant irreparably before the jury.

The Prosecuting Attorney, at page 7 of his brief, on this point, used these words "The Court below found that 'There is nothing in the record to indicate that the United States Attorney asked the question maliciously or in bad faith' (R. 38) and petitioner does not point out anything which shows the contrary". Had the Prosecuting Attorney, in cross-examining Dr. Gerber, first asked him "Q. Doctor, do you know the defendant's general reputation for ethics in the community in which he lives and practices?" and received the answer thereto which the Doctor gave, namely, "I do not" (R. 15) *before* the prejudicial questions (R. 12-14), rather than *after* (R. 15), the good faith of the Prosecuting Attorney might be more apparent. But regardless of good or bad faith of the Prosecuting Attorney, the test should be "What will the jury infer from the objected to questions?" (R. 12, 13, 14).

In *United States* v. *Nettl*, 121 F. (2d) 927 (C. C. A., 3rd, June 23, 1941), (decided subsequent to the instant case

and the filing of the petition for certiorari herein) in reversing the judgment secured therein because of prejudicial questions asked in the court below by the Prosecuting Attorney, said at page 930:

> "It is true that some of the authorities make the curious suggestion that the matter is affected by a subjective standard applied to the District Attorney (Clark v. U. S., 57 App. D. C. 335, 23 Fed. 2d, 756; Chicago B. & O. R. Co. v. Kelly, 8 Cir. 74 Fed. 2d, 80). We cannot understand how the accused is interested in the personal character of his accuser. The prosecutor may be disciplined (Pope v. Boston & Maine RR., 79 N. H. 52, 104 A. 403). But it hurts the defendant just as much to have prejudicial blasts come from the trumpet of the angel Gabriel. (Apt v. United States, 8 Cir., 13 F. 2d 126; Mercer v. United States, 3 Cir., 14 F. 2d 281; Speiller v. United States, 3 Cir., 31 F. 2d 682; Beck v. United States, 8 Cir., 33 F. 2nd 107)."

In the quotation from *People* v. *Mullings* (1890) 83 Cal. 138, 23 P. 229, 231, 17 Am. St. Rep. 223, quoted in the opinion of the Court in the *Nettl* case (*supra*), the Court stated:

> "The purpose of the questions clearly was to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based. To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense."

POINT III.

The decisions of other United States Circuit Courts of Appeals and of the said United States Circuit Court of Appeals of the Third Circuit, in *United States* v. *Nettl, supra,* are in accord with each other, but all are in conflict with the decision of the same Circuit Court of Appeals, Third Circuit, in the instant case.

At the time of the filing of the petition for a writ of certiorari herein, the decision of the United States Circuit Court of Appeals, Third Circuit, in the instant case was in conflict with the decisions of other United States Circuit Courts of Appeals on substantially the same questions of law. On June 23, 1941, subsequent to the filing of the petition for writ of certiorari herein, the United States Circuit Court of Appeals for the Third Circuit in the case of *United States* v. *Nettl, supra,* completely reversed its position and by that decision placed itself in accord with the decisions of the other United States Circuit Courts of Appeals.

The decision of the Circuit Court of Appeals, Third Circuit, in the instant case, therefore, now, is not only in conflict with other United States Circuit Courts of Appeals, but also with a later decision of the same Circuit Court, that in the *Nettl* case, *supra.*

Respectfully submitted,

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